(2)

No. 94-1228

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

SANDRA SALAZAR,

Petitioner,

vs.

WHINK PRODUCTS CO., an Iowa Corporation,

Respondent.

On Petition for Writ of Certiorari to the Colorado Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the preemption provision of the Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.* bars Petitioner's failure to warn tort claims against Respondent, a manufacturer whose product label undisputedly complied with the labeling requirements of the Federal Hazardous Substances Act.

Whether, on Petitioner's Petition for Rehearing, the Colorado Court of Appeals abused its discretion in not remanding this matter to the trial court so that Petitioner could further amend her Amended Complaint to assert a new and different theory of relief against the Respondent.

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OPINIONS BELOW

1. The trial court's opinion upon Respondent's Motion for Summary Judgment appears as Appendix A.

2. The Colorado Court of Appeals' decision of *Salazar v. Whink Products Co.*, 881 P.2d 431 (Colo. App. 1994) appears as Appendix B.

STATEMENT OF THE CASE

This personal injury action brought by Petitioner against Respondent Whink Products Company (improperly captioned as "Whink Products Co.") arises out of Petitioner's misuse of Respondent's product, Whink Rust Stain Remover. It is undisputed that this product contained warnings in compliance with he Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.* These warnings advised Petitioner not to use the product without heavy duty gloves and that the product could cause severe burns which may not be immediately painful or visible. Petitioner admitted that she read and understood these warnings but then chose to ignore them, thereby causing her own injuries. It is undisputed that Petitioner's common law tort claims against Respondent were solely based on the alleged inadequacy of the Respondent's warnings, even though said warnings complied with the Federal Hazardous Substances Act.

At the trial court, Respondent Whink moved for summary judgment on two issues: (1) misuse and (2) federal preemption. The trial court entered summary judgment in favor of Respondent on its misuse defense. On appeal, the Colorado Court of Appeals upheld the trial court's ruling on the grounds that Petitioner's failure to warn claims were preempted by the Federal Hazardous Substances Act, 15 U.S.C. § 1261 *et seq.* and Respondent's undisputed compliance therewith.

STAGE AT PROCEEDINGS FEDERAL QUESTIONS WERE RAISED

Petitioner asserts that the issue of preemption was first raised by Respondent in its Motion for Summary Judgment filed January 7, 1992. This is in error.

A review of the record establishes that Respondent specifically raised the doctrine of federal preemption on June 21, 1991 in its Supplements and Amendments to its Disclosure Certificate. (Vol. 1, pp. 104-130). Thereafter, on or about September 25, 1991, Respondent reiterated this defense in its Answer to Petitioner's Amended Complaint. (Vol. 1, pp. 183-186). Hence, despite Petitioner's assertions to the contrary, Petitioner was on notice of Respondent's defense in this regard at least as of June 21, 1991, if not earlier.

REASONS FOR DENYING THE WRIT

I.

THE COLORADO COURT OF APPEALS, CONSISTENT WITH THE OTHER JURISDICTIONS WHICH HAVE ADDRESSED THIS ISSUE, CORRECTLY HELD THAT THE FEDERAL HAZARDOUS SUBSTANCES ACT PREEMPTS PETITIONER'S FAILURE TO WARN CLAIMS AGAINST THE RESPONDENT WHOSE LABEL COMPLIED THEREWITH.

It is undisputed that Whink Rust Stain Remover is governed by the Federal Hazardous Substances Act ("FHSA"). It is also undisputed that Respondent complied with all of the regulations promulgated under FHSA. (Vol. 1, pp. 249, 262-279, 280-282). Further, it is undisputed that Respondent worked directly with the

Consumer Products Safety Commission or its predecessor on its labeling requirements since 1962 and that it has complied with all label and warning requirements of the appropriate agency. (Vol. 1, pp. 249, 262-279, 280-282). In fact, as the Colorado Court of Appeals noted, the parties did not dispute that the label on Whink Rust Stain Remover comported with the FHSA's labeling requirements. (Colorado Court of Appeals' Opinion, Appendix B, p. 16a).

Further, regardless of how Petitioner now styles her claims, the basis of her claims before the trial court and before the Colorado Court of Appeals was that Respondent's label and warning instructions on the Whink Rust Stain Remover were defective. (Vol. 5, p. 27 — Argument of Petitioner's counsel before the trial court; Petitioner's Opening Brief filed with the Court of Appeals, p. 12 and pp. 17-19 wherein Petitioner admits that the basis of her Amended Complaint was inadequate warning and that this is a failure to warn case). Both the trial court and the Colorado Court of Appeals so found. (Trial court's opinion, Appendix A, p. 5a; Colorado Court of Appeals' Opinion, Appendix B, p. 16a.)

Thus, in essence, in the case at bar, Petitioner wanted a jury to establish a standard for Respondent beyond those standards mandated by the United States government pursuant to FHSA. The Colorado Court of Appeals therefore correctly concluded that FHSA preempted Petitioner's failure to warn claims under these circumstances.

In so doing, the Colorado Court of Appeals first noted that state laws which "interfere with and/or are contrary to the laws of the Congress, made in pursuance of the Constitution," are invalid, citing the case of *Gibbons v. Ogden*, 9 Wheat. 1, 22 U.S. 1, 6 L. Ed. 23 (1824). The Court of Appeals then examined this Court's opinion in *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___,

112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). Given the *Cipollone* case, the Colorado Court of Appeals appropriately held that Petitioner would have to show that FHSA's preemption provision was less sweeping than the language of the 1969 Cigarette Act in order to avoid judgment in Respondent's favor. The Petitioner failed in this regard as the Colorado Court of Appeals could discern no significant difference between the two.

Hence, finding persuasive the analysis of the Fourth Circuit in *Moss v. Parks Corp.*, 985 F.2d 736 (4th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2999, 125 L. Ed. 2d 693 (1993), the Colorado Court of Appeals properly concluded that the FHSA preempted Petitioner's common law failure to warn claims against the Respondent because she sought additional and/or more clearly stated warnings that those required of Respondent by the FHSA. In fact, the Colorado Court of Appeals' holding in this regard is in line with all of the case law on this issue, whether issued before or after the *Cipollone* case. *Moss v. Parks Corp., supra; Chemical Specialties Manufacturers Association, Inc. v. Clark,* 482 F.2d 325 (5th Cir. 1973); *Cosmetic, Toiletry and Fragrance Association, Inc. v. State of Minnesota,* 440 F. Supp. 1216 (D. Minn. 1977), *aff'd,* 575 F.2d 1256 (8th Cir. 1978); *Jenkins v. James B. Day & Co.,* 634 N.E.2d 998 (Ohio 1994); *State v. A.J. Seier,* 871 S.W.2d 611 (Mo. App. 1994).

In addition, in the *Moss* case, the Fourth Circuit Court of Appeals noted that "the preemption issues arising under the Federal Hazardous Substance Act are identical to those arising under the Federal Insecticide, Fungicide and Rodenticide Act ('FIFRA'), 7 U.S.C. § 137 *et seq.*" The Tenth Circuit Court of Appeals addressed the preemptive effect of FIFRA in *Arkansas-Platte & Gulf Partnership v. Van Waters & George, Inc.*, 981 F.2d 1177 (10th Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S. Ct. 60, 126 L. Ed. 2d 30 (1993). There, the Tenth Circuit Court of Appeals held that the FIFRA preemption provision preempted

common law tort actions based upon a failure to warn. This holding is in keeping with all of he circuit courts which have considered this issue since the *Cipollone* decision. *See MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King v. E.I. Dupont De Nemours & Co.*, 996 F.2d 1364 (1st Cir. 1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993). *Papas v. Upjohn Company*, 985 F.2d 516 (11th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 300, 126 L. Ed. 2d 248 (1993). Hence, the Colorado Court of Appeals' opinion in this case on the FHSA is also in line with those jurisdictions which have addressed the preemption issue under FIFRA.

Petitioner cites only one FHSA case as being allegedly to the contrary, *i.e., Jenkins v. James B. Day & Co., supra.* In actuality, this case is completely consistent with the Colorado Court of Appeals' opinion in the case at bar.

In the *Jenkins* case, the Ohio Supreme Court first specifically held that if the evidence showed that the manufacturer had complied with labeling requirements of the FHSA, all tort claims for failure to warn were preempted. *Jenkins v. James B. Day & Co., supra* at 1003, fn. 2 and at 1004. However, in the event the evidence showed that the manufacturer had *not* complied with FHSA requirements, a failure to warn claim could be asserted based upon the manufacturer's *non-compliance* with the FHSA requirements. *Jenkins v. James B. Day & Co., supra* at 1005. Hence, as the *Jenkins* court held, if the evidence showed that the label did comply with the FHSA, summary judgment in favor of the manufacturer would be appropriate. *Jenkins v. James B. Day & Co., supra* at 1004.

In the case at bar, it is undisputed that the Respondent did comply with all of the labeling requirements of the FHSA. In fact, Petitioner has always asserted that Respondent was required to

provide warnings beyond those required under FHSA. (Vol. 5, p. 27 — Argument of Petitioner's counsel before the trial court; Petitioner's Opening Brief filed with the Court of Appeals at p. 19.) For this reason, the Colorado Court of Appeals' opinion in this matter is completely consistent with the Ohio Supreme Court's holding and analysis in the *Jenkins* case.

Finally, Petitioner asserts that the Colorado Court of Appeals applied preemption too broadly as it precluded Petitioner's alleged claims of "negligent design" and that the product simply should have never been marketed, despite its warnings. This argument has no merit.

First, it should be noted that this is the very first time that Petitioner has ever argued that Respondent was negligent in the design of the product. Furthermore, Petitioner did not raise the issue that Respondent should not have marketed the product at all, despite its warnings, until she filed her Petition for Writ of Certiorari with the Colorado Supreme Court. (Petitioner's Petition for Writ of Certiorari filed with Colorado Supreme Court, p. 10). Having failed to raise these issues before the trial court, let alone before the Colorado Court of Appeals, Petitioner cannot raise these issues now. *Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967); *A.O. Smith Harvestore Products, Inc. v. Kallsen*, 817 P.2d 1038 (Colo. 1991).

More importantly, these new positions are directly contrary to the position taken by Petitioner before the trial court as well as before the Colorado Court of Appeals. (Vol. 5, p. 27 — Argument of Petitioner's counsel before the trial court; Petitioner's Opening Brief filed with the Court of Appeals, p. 12 and pp. 17-19 wherein Petitioner admits that the basis of her Amended Complaint was inadequate warning and that this is a failure to warn case). Hence, in making this argument, Petitioner now argues a new theory of recovery on appeal which, under Colorado

law, she is not entitled to do. *See Alzado v. Blinder, Robinson & Co., Inc.*, 752 P.2d 544 (Colo. 1988); *Flader v. Simonsen*, 148 Colo. 480, 366 P.2d 678 (1962); *Miller v. East Denver Municipal Irrigation District*, 83 Colo. 406, 266 P. 211 (1928); *see also Grasmick v. Otis Elevator Co.*, 817 F.2d 88 (10th Cir. 1987).

In sum, there is no reason why this Court should grant Petitioner's Petition for Writ of Certiorari. No question exists that the Colorado Court of Appeals' opinion in this matter on the issue of FHSA preemption is in line with every other court decision addressed to this issue. Moreover, as applied by the Colorado Court of Appeals, the FHSA's preemption provision was limited to preempt Petitioner's failure to warn claims against a manufacturer who had complied with the FHSA requirements. Since these were the only claims pursued by the Petitioner before the trial court and the Colorado Court of Appeals, she is therefore not entitled to have this matter remanded to the trial court so that she can now pursue a different theory of recovery against the Respondent.

II.

THE COLORADO COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S REQUEST FOR REMAND CONTAINED IN HER PETITION FOR REHEARING.

Petitioner argues that the application of the *Cipollone* decision to her is "particularly unfair" and, therefore, pursuant to her Petition for Rehearing, the Colorado Court of Appeals should be ordered to remand this matter to the trial court so that Petitioner can further amend her Amended Complaint and pursue further discovery. Along these lines, Petitioner argues that when she prepared her case, the law was that "compliance with a federal regulation concerning a warning was only one item of evidence which the jury may consider." This argument has no merit.

First, the standard of review regarding the Colorado Court of Appeals' decision not to remand this matter for these purposes is not whether that decision is "particularly unfair," but rather, whether the Colorado Court of Appeals abused its discretion in this regard. *See Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 72 S. Ct. 219, 96 L. Ed. 200 (1952); *People v. Gaskins*, 825 P.2d 30 (Colo. 1992). Clearly, it did not.

First, Petitioner's request for a remand to the trial court was not presented to the Colorado Court of Appeals until Petitioner filed her Petition for Rehearing. It is a well-recognized rule that questions not advanced at the original hearing of an appeal will not be considered on the petition for rehearing. *Seven Lakes Reservoir Co. v. New Loveland & The Greeley Irrigation & Land Co.*, 40 Colo. 382, 93 P. 485 (1907); *See Independent Wireless Telegraph Co. v. Radio Corporation of America*, 270 U.S. 84, 46 S. Ct. 224, 70 L. Ed. 481 (1926). Hence, no abuse of discretion could have occurred when the Colorado Court of Appeals failed to remand this matter to the trial court in accordance with Petitioner's request in her Petition for Rehearing.

In addition, despite Petitioner's assertions to the contrary, the doctrine of federal preemption has been in existence and the law in the United States since at least 1819. *M'Culloch v. State*, 4 Wheat. 316, 17 U.S. 316, 4 L. Ed. 579 (1819). Moreover, as of 1973 and 1977, respectively, at least one federal circuit court of appeals and one federal district court had held that the FHSA preempts failure to warn claims against manufacturers who had complied with its provisions. *See Chemical Specialties Manufacturers Association, Inc. v. Clark, supra; Cosmetic, Toiletry and Fragrance Association, Inc. v. State of Minnesota, supra.* Hence, the doctrine of federal preemption and, in particular, as to the FHSA, had been in existence long before Petitioner filed her Complaint in this matter on July 19, 1990.

Further, it is undisputed, in both its Supplements and Amendments to its Disclosure Certificate and its Answer to Petitioner's Amended Complaint, Respondent advised Petitioner that it intended to rely upon the doctrine of federal preemption in this matter. Thereafter, on January 7, 1992, Respondent moved for summary judgment, asserting that its labels had complied with all the federal regulations and labeling requirements. (Vol. 1, pp. 233-234). This assertion was established pursuant to Exhibit A and Exhibit B attached to Respondent's Brief in Support of Motion for Summary Judgment. (Vol. 1, pp. 249, 262-279, 280-282). Prior to Petitioner's Petition for Writ of Certiorari to the Colorado Supreme Court, Petitioner never even argued that Respondent had failed to comply with FHSA, let alone even attempt to establish that a disputed issue of fact existed on this issue. Having failed to do so at the trial court level, Petitioner is not entitled to do so now on appeal. *Minnich v. Gardner,* 292 U.S. 48, 54 S. Ct. 567, 78 L. Ed. 1116 (1934); *A.O. Smith Harvestore Products, Inc. v. Kallsen, supra.*

In addition, the fact that Petitioner's counsel mistakenly decided that Respondent's compliance with the federal regulatory standards was not an essential issue in this litigation and, therefore, did not conduct any discovery on this issue, cannot serve as a basis for allowing Petitioner to further amend her Amended Complaint long after Respondent has been successful on its summary judgment motion on this issue. It is undisputed that Petitioner's counsel was aware that Respondent was relying on a preemption defense since June 31, 1991 and, at the very latest, since January 7, 1992 when Respondent filed its Motion for Summary Judgment. Given that the trial court's Order entering summary judgment in favor of Respondent was not issued until September 14, 1992, Petitioner had more than adequate time to fully address this preemption issue at the trial court level. The fact that she did not do so cannot serve as the basis for allowing her to do so now. *Miller v. East Denver*

Municipal Irrigation Ditch, supra; Perkins v. Flatiron Structures Co., 849 P.2d 832 (Colo. App. 1992); *see Grasmick v. Otis Elevator Co., supra.*

Further, it can hardly be said that the longstanding law of federal preemption "changed" while Respondent's Motion for Summary Judgment or this appeal was pending. Here, in its Brief in Support of its Motion for Summary Judgment, Respondent not only set forth the specific preemption language of FHSA, but cited two specific cases which held that FHSA preempted the states from establishing any different standards. Thus, since at least January 7, 1992, Petitioner has been well aware of the federal case law which was directly contrary to her position at both the trial court and appeals levels.

Finally, the *Cipollone* opinion was issued in June, 1992 and, thereafter, Respondent specifically advised Petitioner that it was relying upon that opinion as to the issue of federal preemption. (Vol. 2, pp. 397-420). Given that the trial court did not enter any Order for summary judgment until September 14, 1992, Petitioner also had more than adequate time to explore the federal preemption issue as affected by the *Cipollone* case at the trial court level.

In sum, Petitioner had more than ample time to pursue the federal preemption issue at the trial court level, but failed to do so. She therefore is not entitled to do so now. In light of this, the Colorado Court of Appeals obviously did not abuse its discretion in denying Petitioner's request in her Petition for Rehearing to remand this matter to the trial court for that purpose.

CONCLUSION

In sum, this Petition for Writ of Certiorari must be denied in this matter because (1) the Colorado Court of Appeals, in line with all the other jurisdictions which have addressed this issue, properly held that Petitioner's claims, as presented here, are preempted by the Federal Hazardous Substances Act and (2) the Colorado Court of Appeals did not abuse its discretion in denying Petitioner's request in her Petition for Rehearing to have this matter remanded to the trial court in order to allow her to further amend her Amended Complaint and to pursue a new theory of recovery against the Respondent.

Respectfully submitted,

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APPENDIX A — OPINION OF THE DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO DATED SEPTEMBER 14, 1992

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 90-CV-7830 Courtroom 21

SANDRA SALAZAR,

Plaintiff,

v.

WHINK PRODUCTS CO., an Iowa corporation and MONTE VISTA ARAPAHOE, INC., dba MONTE VISTA SUPER FOODS, a Colorado Corporation, ROBERT W. SPLETTSTOESSER, M.D., and MONTE VISTA PROFESSIONAL ASSOCIATES,

Defendants.

ORDER

THIS MATTER is before me on a Motion for Summary Judgment filed by Defendant Whink Products Company ("Whink") on January 8, 1992, joined by Defendants Monte Vista Arapahoe, Inc. ("Super Foods"), Robert W. Splettstoesser ("Splettstoesser") and Monte Vista Professional Associates ("Monte Vista"). Based on my review of the Motion and briefs, the affidavits, and the case file, and the hearing held on the Motion on September 10, 1992, I rule as follows.

Appendix A

I. INTRODUCTION

Motions for summary judgment are disfavored, and the allegations of the non-movant must be taken as true unless they are clearly disproved by unrebutted affidavits or products of discovery. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987). With this standard in mind, the material facts of this case are as follows.

The case arises out of Plaintiff's allegations that she was injured while using Whink Rust Stain Remover, and that she was thereafter negligently treated for her injuries. At the time of her injuries, Plaintiff had been in the professional cleaning business for 11 years. She cleaned offices as well as private residences. In July 1989, Plaintiff visited Defendant Super Foods for the purpose of purchasing a window cleaner, apparently to use on some water stained windows in Plaintiff's own home. In reliance on a specific recommendation of the owner of the Super Foods store, Plaintiff purchased a bottle of Whink Rust Stain Remover. Whink Rust Stain Remover is a cleaning fluid designed to remove rust stains from fabrics and well as sinks and toilet bowls. It is 8% hydrofluoric acid.

The bottle which Plaintiff purchased contained the following warnings on the front of the bottle (emphasis in original):

> Not a general purpose rust remover.
>
> Read precautions and directions before using.
>
> DANGER: MAY BE FATAL OR CAUSE PERMANENT DAMAGE. CAUSES

Appendix A

SEVERE BURNS WHICH MAY NOT BE IMMEDIATELY PAINFUL OR VISIBLE. VAPORS HARMFUL. CONTAINS HYDROFLUORIC ACID. KEEP OUT OF REACH OF CHILDREN. Use Only With Heavy Duty Household Rubber Gloves. Read back panel for additional pre-cautions and directions.

The back of the bottle was marked at the top with skulls and crossbones and the following warning (emphasis in original):

DANGER-POISON
AVOID CONTRACT WITH SKIN OR EYES.
DO NOT TASTE, SWALLOW OR BREATHE.

The back also contained certain general instructions on use, as well as medical instructions should the product be swallowed or come in contact with the skin or eyes.

Plaintiff read the warnings on the front of the bottle, including the directions to wear rubber gloves, but did not read the warnings on the back until after she sustained her injuries.

Plaintiff spent three hours washing her windows with a Whink-soaked towel wrapped around her unprotected right hand. Later that afternoon, Plaintiff's hand began to burn, she was unable to stop the pain with water, and she was rushed to Dr. Splettstoesser's clinic. Plaintiff claims Splettstoesser negligently misdiagnosed her chemical burns as an allergic reaction, resulting in significant delays in appropriate treatment.

Appendix A

Plaintiff suffered second and third degree burns on her right thumb and forefinger, and underwent two amputative surgeries to her right index finger. Plaintiff has a permanent disability rating, and also suffers from reflex sympathetic dystrophy.

II. CLAIMS AND DEFENSES

Plaintiff asserts the following claims against the following Defendants:

CLAIM	TYPE	DEFENDANT
First	Negligence	Whink
Second	Products liability	Whink
Third	Negligence	Super Foods
Fourth	Breach of implied warranty	Super Foods
Fifth	Exemplary damages	All
Sixth	Medical malpractice	Splettstoesser Monte Vista

At oral argument, Plaintiff's counsel announced that Plaintiff has settled the case with all Defendants except Whink, and that documents reflecting that settlement have been prepared and are in the process of being executed.

Plaintiff seeks in excess of $70,000.00 in medical expenses, damages for past and future lost wages, pain and suffering, and exemplary damages.

Appendix A

Defendants raise two arguments in their Motion: (1) Plaintiff's claims are preempted by the Federal Hazardous Substances Act, 15 U.S.C. §§1261, *et seq.*, and (2) Plaintiff's claims are barred by Plaintiff's misuse. Because I agree that Plaintiff's claims are barred as a matter of law by her own misuse, I do not reach Defendants' preemption argument.

III. THE UNCONTRADICTED FACTS REQUIRE DISMISSAL OF THE FAILURE TO WARN ASPECTS OF PLAINTIFF'S CLAIMS

The strict liability concepts set out in §402A of the Restatement (2d) of Torts, as adopted in Colorado in *Hiigel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975), recognize two general categories of product liability actions — one where the product is claimed to be organically defective, or, in the language of the Restatement, "unreasonably dangerous," and another where the claimed defect is a failure to warn. *See Jackson v. Harsco Corp.*, 673 P.2d 363 (Colo. 1983).

Here, Plaintiff's Amended Complaint confuses these two basic concepts with each other, and also confuses strict liability with negligence, and unreasonable dangerousness with ultrahazardousness.[1] Despite these shortcomings, it is clear that the focus of Plaintiff's strict liability and negligence claims is an alleged failure to warn. *See* Amended Complaint ¶¶ 12(b) and 15. At oral argument, Plaintiff's counsel indicated that the gravamen of Plaintiff's failure to warn case is that Whink failed to give the latent nature of the danger — the fact that the product doesn't burn until long after coming in contact with the skin — adequate prominence, and that Plaintiff's expert would so testify. There are several problems with this argument.

---

1. See Part IV below.

First, Plaintiff has not supported this argument with her expert's report or with transcripts from the expert's deposition. Counsel's mere representations at this stage are insufficient to create a triable issue of fact, in the face of the undisputed presence of just such a warning in what appears to me to be a fairly prominent place on the front of the Whink bottle. *See Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970).

More importantly, Plaintiff has admitted not only that she read the warnings contained on the front of the bottle, but that she understood them. *See* excerpts of Plaintiff's Deposition set forth in Part V.B. below. Thus, the warnings, however inadequate, managed to find their way into Plaintiff's consciousness. Any inadequacy could therefore not, as a matter of law, have caused any of Plaintiff's injuries. *See Schultz v. Linden-Alimak, Inc.*, 734 P.2d 146 (Colo. App. 1986).

This is really just a different way of describing the conclusion reached in Part V.B. below; namely, that Plaintiff misused the product by failing to heed the warnings which she admittedly read and appreciated.

IV. WHINK STAIN REMOVER IS NOT "ULTRAHAZARDOUS"

At oral argument, Plaintiff's counsel indicated that his use of the term "ultrahazardous" in his First and Second Claims for Relief was not inartful, but rather that Plaintiff is taking the position that Whink Rust Stain Remover is indeed ultrahazardous in the sense that it triggers absolute liable. Plaintiff's argument in this regard is wholly unsupportable.

Our appellate courts have recognized only two specific

activities as being so "ultrahazardous" as to render the performers of these activities absolutely liable for all damages arising therefrom. Those specific activities are dynamite blasting (*Garden of Gods Village v. Hellman,* 133 Colo. 286, 294 P.2d 597 (1956)) and the impoundment of water (*Garnet Ditch & Reservoir Co. v. Sampson,* 48 Colo. 285, 110 P. 79 (1910)). Indeed, on every occasion since 1956 in which our appellate courts have been asked to expand this doctrine into other areas, they have expressly refused to do so. *Liber v. Flor,* 160 Colo. 7, 415 P.2d 332 (1960) (*storage* of dynamite is not ultrahazardous); *Forrest v. Imperial Distr. Serv. Inc.,* 712 P.2d 488 (Colo. App. 1987), *rev'd on other grds.,* 741 P.2d 1251 (Colo. 1987) (storage and handling of caustic chemicals is not ultrahazardous); and *Hartford Fire Ins. Co. v. Public Serv. Co.,* 676 P.2d 25 (Colo. App. 1983) (transmission of natural gas not ultrahazardous). *Cf. City of Northglenn v. Chevron U.S.A. Inc.,* 519 F. Supp. 515 (D. Colo. 1981), in which Judge Carrigan indicated his belief that the Colorado courts would extend the doctrine of ultrahazardousness to the storage of underground gasoline tanks. I note, however, that when Judge Carrigan decided *Northglenn,* he did not have the benefit of either of the Court of Appeals' or the Supreme Court's opinions in *Forrest. See generally* Restatement (2d) of Torts §§ 519 and 520 (recognizing the concept of ultrahazardousness but calling it "abnormally dangerous activities").

Plaintiff's argument that Whink Rust Stain Remover is ultrahazardous, and therefore that Whink is an absolute insurer of any and all damage caused by its sale of its product, would, if adopted, represent an entirely unwarranted and unprecedented expansion of the doctrine of ultrahazardousness.

Appendix A

V. THE UNCONTRADICTED FACTS ESTABLISH MISUSE AS A MATTER OF LAW

A. General

The defense of misuse in a products case was first expressly articulated by our Supreme Court in *Jackson v. Harsco Corp., supra.* The *Jackson* Court described the defense this way:

> Misuse by an injured party which cannot reasonably be anticipated by the manufacturer can be utilized as a defense in a products liability case by showing that the conduct of the user, and not the alleged defect in the product, actually caused the accident.

673 P.2d at 367. *See also Bradford v. Bendix-Westinghouse Automotive Air Brake Co.*, 33 Colo. App. 99, 517 P.2d 406 (1973). There are thus two elements which must be proved to establish the misuse defense: (1) the misuse must be unforeseeable from the manufacturer's point of view, and (2) the misuse must have caused the injuries.

One kind of misuse arises when an injured party uses a product for a purpose for which the product was not intended. But our appellate courts have come to recognize that it may also be misuse to use a product to accomplish its intended purpose, but to do so in an unforeseeably improper *manner. See, e.g., Uptain v. Huttington Lab, Inc.*, 723 P.2d 1322 (Colo. 1986) *Patterson v. Magna American Corp.*, 754 P.2d 1385 (Colo. App. 1988). When the user is notified of the proper manner of use, "the seller may reasonably assume that [such notice] will be read and heeded." *Uptain,* 723 P.2d at 1327, *citing* Comment J to the Restatement (2d) of Torts § 402A.

B. It Is Uncontroverted That Plaintiff Read And Understood The Warnings, And Unforeseeably Misused The Product By Failing To Heed The Warnings.

It is certainly true that the foreseeability of any misuse is a question of fact, generally inappropriate for resolution by summary judgment. *Uptain, supra.*

On the other hand, where, as here, a plaintiff admits to reading a warning, and to consciously choosing to disregard the warning, and when heeding that warning would have avoided all of a plaintiff's injuries, then I do not believe there is anything left for a jury to decide.

Plaintiff testified as follows regarding her reading and appreciation of the front label warnings:

Q: Did you read the bottle before you opened it?

A: I read the front part of it.

Plaintiff's Deposition, p. 25, lines 18-20.

Q: Why didn't you go get some gloves?

A: Because I didn't have any gloves.

Id. at 28, lines 23-24.

Q: Before you used the product, did you read the words "causes severe burns," before you used the product?

A: I read the front of that bottle.

Q: All of it?

A: Yes.

Q: Before you used the bottle?

A: Yes.

Id. p. 45, lines 2-9.

Q: You didn't have any questions about what [the label] meant?

A: No.

Id. p. at 47, lines 11-13.

Q: All right. We get down to the sentence that reads: "Use only with heavy duty household rubber gloves." If I understand what you told Mr. Cooper, the reason that you didn't use household rubber gloves was because you didn't have any there?

A: Right.

Q: Any you didn't want to spend the time to go back to the store to get some?

A: Right. And by using the rag, I felt it was the same way of not getting contact to my skin. I felt it was thick enough, that there was no way it could reach my skin.

Appendix A

Id. at 152, lines 21-25; 153, lines 1-5.

Q: Did you think about going back to the store to get rubber gloves?

A: I thought in my head: What harm could it do, I'm not using it straight on my hand.

Q: When you read that sentence, did you understand that it was important to protect yourself from this product contacting your skin?

A. Yes, I did.

Q: Did you think about going back to the grocery store to get rubber gloves so that that wouldn't happen?

A: No.

Id. at 153, lines 14-25.

Q: Even though you started out thinking that the heavy rag would be sufficient to keep the product away from your skin, at some point during the cleaning process, you realized that it wasn't because you felt wetness on your skin, is that right?

A: Yes.

Q: At that time did you consider going back to the grocery store to get some rubber gloves so you wouldn't have any additional contact on your skin from the product?

A: No, because I didn't feel nothing that would indicate that something was wrong.

Q: You did read the sentence that says: "Causes severe burns which may not be immediately painful or visible"?

A: When I was reading it as a paragraph, yes.

Id. at 154, lines 8-25.

It is clear to me from this deposition transcript not only that Plaintiff read and appreciated the warnings placed on the front of the bottle, but also that there was nothing on earth that Whink could have done to make these warnings sink in.[2] This is one of those extreme misuse cases, like *Schultz v. Linden-Alimak, Inc.*, 734 P.2d 146 (Colo. 1986), in which a manufacturer places warnings on a product, the warnings are sufficient to be understood and appreciated by the plaintiff, but the plaintiff simply and plainly chooses to ignore the warnings.

Uptain, which also involved injuries to a plaintiff who used a cleaning product without rubber gloves, is quite instructive. In affirming the trial court's conclusion that misuse was a question of fact for the jury, the Supreme Court made much of the fact that the warnings in that case did *not* contain explicit directions to wear rubber gloves. Moreover, it was the plaintiff in *Uptain* arguing that her misuse was foreseeable as a matter of law, rather than the defendant arguing it was unforeseeable. Finally, the plaintiff in *Uptain* used a swab to apply the product; she came in

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2. I have reviewed not only the portion of Plaintiff's transcript which Defendants submitted with their briefs, but the entire transcript, which I directed Defendants to submit prior to the September 10, 1992 hearing.

contact with the product directly only when periodically wringing the swab out during *rinses.*

Here, the evidence is also undisputed, as it was in *Schultz,* that had Plaintiff not ignored the warnings — that is, had Plaintiff worn rubber gloves as directed — she would have avoided her injuries entirely. Report of Dr. Daniel A. Goldstein, dated May 28, 1991, attached as Exhibit F to Whink's Motion for Summary Judgment. Thus, it was Plaintiff's own volitional act of using the product contrary to the warnings which caused her injuries, not any product defect or failure to warn.

VI. CONCLUSION

For all of the reasons discussed above, Defendants' Motion for Summary Judgment is GRANTED as to all of Plaintiff's claims against Whink, and all of those claims are hereby DISMISSED WITH PREJUDICE. This dismissal will become a final judgment when Plaintiff's claims against the non-Whink Defendants are dismissed pursuant to the settlement.

Plaintiff and the non-Whink Defendants are directed to file a stipulated motion for dismissal and draft order reflecting their settlement within 30 days of the date of this Order.

Dated this 14th day of September, 1992.

BY THE COURT:

s/ Morris B. Hoffman
Morris B. Hoffman
District Court Judge

Appendix A

cc: A. Walsh
F. James Donnelly
J. Ronald Voss
L. Heintz
D. Smith

APPENDIX B — DECISION OF COLORADO COURT OF APPEALS DATED APRIL 7, 1994

April 7, 1994

COLORADO COURT OF APPEALS
No. 93 CA0055

Sandra Salazar,

Plaintiff-Appellant,

v.

Whink Products Company, an Iowa corporation,

Defendant-Appellee.

Appeal from the District Court of the City and County of Denver
Honorable Morris B. Hoffman, Judge
No. 90CV7830

Division I JUDGMENT AFFIRMED
Opinion by CHIEF JUDGE STERNBERG
Briggs and Tursi*, JJ., concur

Dyer Donnelly & Lilley, F. James Donnelly, Denver, Colorado, for Plaintiff-Appellant

Retherford, Mullen, Johnson & Bruce, J. Ronald Voss, Amelia L. Klemme, Colorado Springs, Colorado, for Defendant-Appellee

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* Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and §24-51-1105, C.R.S. (1988 Repl. Vol. 10B).

Appendix B

In this products liability action, plaintiff, Sandra Salazar, appeals the summary judgment entered in favor of defendant, Whink Products Co., which determined that Whink was not liable for plaintiff's injuries resulting from her use of its product, Whink Rust Stain Remover. We affirm.

Plaintiff asserts that genuine issues of material fact remain as to the adequacy of the warnings on the product and the foreseeability of her failure to heed those warnings. Whink contends that the trial court properly dismissed plaintiff's claims on the basis of her unforeseeable misuse of the product, but also argues that her claims are preempted by the Federal Hazardous Substances Act (FHSA), 15 U.S.C. §§ 1261-1277 (1988). It is undisputed that the label on the product at issue complies with the FHSA, and we conclude that the FHSA preempts plaintiff's duty to warn claims. Thus, we affirm the summary judgment, but on grounds different from those relied upon by the trial court.

Under the Supremacy Clause, U.S. Const., art. VI, cl. 2, state laws which "interfere with or are contrary to the laws of Congress, made in pursuance of the constitution," are invalid. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). Whether a federal statute preempts a state law or claim turns on Congressional intent, and that intent may be explicit in the statute itself. *Cipollone v. Liggett Group, Inc.*, __ U.S. __, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

In its most recent pronouncement on federal preemption, the United States Supreme Court held that a broad statement in a federal law prohibiting state regulation also bars common law tort claims. *Cipollone v. Liggett Group, Inc., supra.*

Appendix B

The federal laws at issue in *Cipollone* were the Federal Cigarette Labeling and Advertising Act (1965 Cigarette Act) and the Public Health Cigarette Smoking Act of 1969 (1969 Cigarette Act), 15 U.S.C. §§1331-1340 (1988). The preemption provision in the 1965 Cigarette Act was narrow and stated: "No *statement* relating to smoking and health shall be required *in the advertising* of [properly labeled] cigarettes." *Cipollone, supra,* __ U.S. at __, 112 S. Ct. at 2618, 120 L.Ed.2d at 421 (emphasis in the original). Congress' emphasis on the words "statement" and "advertising" led the Court to conclude that the 1965 Cigarette Act preempted only state and federal regulations requiring additional warnings, but did not affect state law damages actions.

The 1969 Cigarette Act, however, used much broader language; it barred not merely "statements," but any "requirement[s] or prohibition[s] . . . imposed under stated law." *Cippolone, supra,* __ U.S. at __, 112 S.Ct. at 2619, 120 L.Ed.2d at 422. This language, the Court held, indicated legislative intent to ban state common law labeling and duty to warn claims along with direct state regulation of labels.

The court noted that: "[T]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules." *Cipollone, supra,* __ U.S. at __, 112 S.Ct. at 2620, 120 L.Ed.2d at 426.

In order to succeed in the wake of *Cipollone*, then, the plaintiff would have to show that FHSA's preemption language is less sweeping than the language of the 1969 Cigarette Act; however, we can discern no significant difference between the two.

Appendix B

The FHSA was enacted in 1960 to mandate labeling of certain "hazardous" consumer products intended for use in the household or by children. *Chemical Specialities Manufacturers Ass'n v. Allenby*, 958 F.2d 941 (9th Cir. 1992). The purpose of the Act was to "provide nationally uniform requirements for adequate cautionary labeling." House Committee On Interstate and Foreign Commerce, Federal Hazardous Substances Labeling Act, H.R. Rep. No. 1861, 86th Cong., 2d Sess. 2 (1960), *reprinted in* 1960 U.S. Code Cong. & Admin. News 2833. The scope of the Act's coverage as to these products is extremely broad. *Toy Manufacturers of America, Inc. v. Blumenthal*, 986 F.2d 615 (2d Cir. 1992). Thus, the central requirement of the Act is that manufacturers of hazardous products provide cautionary labels clearly indicating the hazards and providing consumers with directions for use. The parties do not dispute that the label on Whink Rust Stain Remover comports with the FHSA's labeling requirements.

As enacted, the FHSA did not contain a preemption section. However, when the Act was amended in 1966, the legislative history discussed the impracticality of having the states produce potentially fifty different labels for a particular hazardous substance. House Committee On Interstate and Foreign Commerce, Child Protection Act of 1966, H.R.Rep. No. 2166, 89th Cong., 2d Sess. 3 (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 4095, 4097. The 1966 amendments added a limited preemption provision which provides as follows:

> It is hereby expressly declared that it is the intent of the Congress to supersede any and all laws of the States and political subdivisions thereof insofar as they may now or hereafter provide for the precautionary

> labeling of any substance or article intended or suitable for household use (except for those substances defined in sections 2(f) (2) and (3) of this Act) which differs from the requirements or exemptions of this Act or the regulations or interpretations promulgated pursuant thereto. Any law, regulation, or ordinance purporting to establish such a labeling *requirement* shall be null and void.

Child Protection Act of 1966, Pub. L. No. 89-756, 80 Stat. 1303 (1966) (current version at 15 U.S.C. § 1261 (1988)); *see also* § 13-21-403(1)(b) C.R.S. (1987 Repl. Vol. 6A) (emphasis added).

In our view, the language prohibiting a state from imposing "a requirement" for labeling that is not identical to the labeling requirements under the Act is as inclusive as the language of the 1969 Cigarette Act stating that "no requirement or prohibition" shall be imposed under state law. The prohibition of "a requirement" is the functional equivalent of "no requirement." *See Arkansas-Platte & Gulf v. Van Waters & Rogers*, 981 F.2d 1177 (10th Cir. 1993).

We find persuasive the reasoning of the court in *Moss v. Parks Corp.*, 985 F.2d 736 (4th Cir. 1993), which held that the FHSA preempted common law failure to warn claims when the plaintiff seeks additional or more clearly stated warnings than those required by the FHSA. In determining that the FHSA applied to common law tort actions as well as state labeling regulations, the court stated that: "[I]f federal law mandates a specific label and permits nothing additional or different, it can hardly be urged that a state tort duty based on a warning requirement that is more elaborate and different does not conflict.

The manufacturer in that case cannot comply with both." *Moss v. Parks Corp., supra*, at 739-740.

Moreover, the purposes underlying both legislative regulation of labeling and a state common law duty to warn are the same. Indeed, a state common law duty to warn is nothing more than a duty to label a product to provide information. In that sense, the common law duty is no less "a requirement" in the preemption scheme than a state statute imposing the same burden. The objective of the common law duty and a regulatory statute are the same. Both address a manufacturer's duty to convey information about a product through the medium of a label.

That a common law action can result in an award of damages to an injured party does not detract from the ultimate purpose of imposing a duty to warn the users of a product about its potential dangers or other properties. Therefore, we find in only logical to hold that the common law duty to warn is subjected to the same federal preemptive constraints as a state statute.

Accordingly, to the extent that plaintiff seeks additional, different, or more clearly stated warnings, her claim is expressly preempted by the FHSA.

Because of our disposition of this issue, it is unnecessary to address the remaining issues.

Judgment affirmed.

JUDGE BRIGGS and JUDGE TURSI concur.